

**FAIR EMPLOYMENT & HOUSING COMMISSION**

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## MINUTES 474<sup>th</sup> COMMISSION MEETING

September 16, 2008  
Held Telephonically in  
Los Angeles, Sacramento, Palo Alto, San Leandro  
and San Francisco, California

***PRESENT:***

**Los Angeles:** Chairman George Woolverton.

**Sacramento:** Commissioner Linda Ng; Gail Blanchard-Saiger, California Hospital Association and Joanne Roy, Senate Office of Research.

**Palo Alto:** Commissioner Carol Freeman.

**San Leandro:** Vice-Chair Tamiza Hockenhull.

**San Francisco:** Commission staff Ann Noel, Caroline Hunt, Joseph Ragazzo, Denise Choye, and Loc D. Tra; DFEH Director Phyllis Cheng and Deputy Attorney General Nancy Beninati.

***OPEN SESSION***

Chairman Woolverton moved, Vice-Chair Hockenhull seconded, and the Commission unanimously called the meeting to order at 3:05 p.m. [08-23]

**REVIEW OF AGENDA**

The Commission accepted the Agenda as submitted.

**REVIEW OF THE MINUTES**

Chairman Woolverton moved, Vice-Chair Hockenhull seconded, and the Commission unanimously voted to adopt the Minutes and Transactions of the 473<sup>rd</sup> Commission meeting as submitted. [08-24]

The Commission ended Open Session and entered Closed Session.

***CLOSED SESSION***

Only the Commissioners, Commission staff, and Attorney General staff were present.

The Commission discussed writs, hearings and litigation and deliberated on pending cases.

**Writs and Appeals**

ELAS Noel reported on the updated status of the following cases.

- (1) DFEH v. San Francisco BART (Bartley)

Respondent BART's reply brief is due October 9, 2008 and the oral argument will be set by the Court of Appeal.

- (2) DFEH v. Prunty's New Beginnings (Project Sentinel/Jensen)

This case has settled and all parties involved accepted the Commission's revised attorney's fees award.

- (3) DFEH v. Sasco Electric (Scherl)

Respondent Sasco Electric has filed a Notice of Appeal in the Court of Appeal.

- (4) DFEH v. City of Fullerton (Montero)

This case has settled.

- (5) Constellation Wines v. DFEH (FEHC, real party in interest)

Constellation Wines filed a writ claiming that the DFEH had agreed to a settlement and thus the accusation should be dismissed. The Superior Court denied the writ and the parties thereafter settled the case.

**Post Decision**

ELAS Noel reported that most of the following cases are in collection status and the Commissioners will be kept posted on their status.

- (1) DFEH v. CATERON, et al (Benjamin)

- (2) DFEH v. Capitol Hills AM/PM (Johnson)

- (3) DFEH v. San Diego City Event (Handevitdt)

- (4) DFEH v. Harry Mayo (Young)
- (5) DFEH v. Fulkerson (Hartunian)
- (6) DFEH v. Gonzales (Banks/Project Sentinel)
- (7) DFEH v. Team One Stop (Reed)
- (8) DFEH v. Ottovich (Coleman)

**Administrative Adjudication:** *Pending Decisions, Hearings Completed – 100 days for FEHC to act in [bold]*

At 3:10 p.m., ALJ Hunt left the room and ALJ Ragazzo presented the following case.

- (1) DFEH v. Maureen O’Neill Family Trust (Lemons/Williams) [9/19/08]

Chairman Woolverton moved, Vice-Chair Hockenhull seconded, and the Commission voted 4:0 to adopt the proposed decision. [08-25]

Chairman Woolverton moved, Vice-Chair Hockenhull seconded, and the Commission voted 4:0 to make the proposed decision precedential. [08-26]

ALJ Hunt rejoined the meeting at 3:18 p.m.

At 3:20 p.m. Gail Blanchard-Saiger of the California Hospital Association joined the meeting at the Sacramento location.

The Commission ended Closed Session and entered Open Session.

## ***OPEN SESSION***

### **REGULATIONS**

ELAS Noel reported on the current status of the Commission’s regulatory projects in the areas of pregnancy, disability and housing.

#### **Pregnancy Regulations:**

The Commission’s final, revised pregnancy regulations were approved at the April 25, 2008, Commission meeting and thereafter submitted to the State and Consumer Services Agency. As part of the rulemaking process, state law requires state agencies to analyze the fiscal effect of any new or revised regulations through a “Fiscal Impact Statement,” a “Form 399.” The Form 399 must be approved and signed by both the SCSA Secretary and the Department of Finance prior to formally

initiating the rulemaking process. SCSA signed off on August 26, 2008, and the regulations have now been forward to the Department of Finance. Commissioner Freeman is working with staff on this project.

**Disability Regulations:**

Commission staff held a September 15, 2008 meeting with the Commission's disability working group to review proposed changes to the disability regulations. Commissioner Freeman is also working with staff on this project.

**Housing Regulations:**

ELAS Noel stated that staff is making progress on Commission housing regulations, holding monthly meetings with the Commission's housing working group to discuss issues and to review draft language. The next meeting will be September 19, 2008 from 10 a.m. to noon at the Commission's offices in San Francisco, with the option to participate telephonically. Commissioner Hockenhull is working with staff on this project.

**LEGISLATION**

ALJ Ragazzo reported on legislative bills that would amend or impact the Fair Employment and Housing Act (FEHA), change or modify other civil rights laws, or be of interest to the Commission. ALJ Ragazzo discussed the status of AB 2874 (Ralph Act Damages) and AB 2134 (Employment Discrimination: Family and Medical Leave)

AB 2874 would allow the Commission to award full compensatory damages to hate crime victims to the extent that they are properly deserved. Specifically, AB 2874 would remove the \$150,000 damages cap for Ralph Act Violations. AB 2874 passed through the Senate and Assembly and is now awaiting action by the Governor.

AB 2134 conformed the California Family Rights Act (CFRA) to recent amendments to the federal Family Medical Leave Act (FMLA) by including military family leaves. Specifically, AB 2134 would expand the definition of "family care and medical leave" to permit leave when an employee's spouse, child, parent, grandparent, grandchild, or sibling is on active duty, or has been called to active in the United States military. AB 2134 did not pass through the Assembly Appropriations Committee.

ALJ Ragazzo noted that the deadline for presenting new legislation proposals for 2009 is October 15.

**COMMISSIONERS' REPORTS**

Commissioner Tamiza Hockenhull is seeking reappointment to the Commission.

At 3:27 p.m. Joanne Roy of the Senate Office of Research joined the meeting at the Sacramento location.

In May, Commissioner Linda Ng received the Local Heroes Award from KVIE, a Sacramento Public Broadcasting station. She was honored for her work with the Asian Pacific American community and the Commission. Commissioner Ng's reappointment was confirmed by the Senate on September 15.

**EXECUTIVE AND LEGAL AFFAIRS SECRETARY'S (ELAS) ACTIVITY REPORT**

ELAS Noel discussed the following items from her report.

**Commissioners Appointments:** Commissioner Hockenhull has requested reappointment to the Commission. The Commission has been told by State and Consumer Services Agency that one or more Commissioner appointments will be made soon.

Commissioner Freeman inquired about the expiration of her term. ELAS Noel replied that Commissioner Freeman's term expires in September 2009.

DFEH Director Phyllis Cheng joined the meeting at 3:30 p.m.

ELAS Noel deferred her report and conceded to Director Cheng to proceed with the Department's report.

**DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING'S REPORT**

DFEH Director Phyllis Cheng reported on recent activities and updates at the Department and her three year plan to implement the Department's mission.

**Goals:** Director Cheng would like to improve the Department's delivery of public service. The Department's online automatic appointment and right-to-sue systems are working very well. Currently 30% of all the appointments are being made online and more than 400 right-to-sue letters have been issued.

**Enforcement:** In August, the Department issued 10 accusations and settled cases with compensatory damages awards worth approximately one million dollars.

The Department has also begun to issue Director's Complaints for high impact and/or underserved cases and class complaints regarding multiple complainants. DFEH is discussing working with other agencies where appropriate such as the Equal Employment Opportunity Commission (EEOC), the California Agricultural Labor Relations Board (ALRB) and the U.S. Department of Justice.

Director Cheng has established a Special Investigation Unit for systemic discrimination investigation headed by DFEH Administrator Selena Wong. Several of these cases are under review. One case concerns failure to promote and to hire female fire fighters in a municipality.

**Legislative Initiatives:** DFEH is also looking at legislative initiatives such as a mandatory AB 1825 Sexual Harassment Training certification and licensing program. ELAS Noel had alerted Director Cheng that an electronic training provider had created a fake seal of approval from DFEH representing that DFEH had authorized them to conduct the sexual harassment training. The Department has no such certification and thus issued this company a cease and desist letter.

**Education:** The Department has created a YouTube video called “Equal Rights 101” which consists of four segments: pregnancy discrimination, pre-employment inquiry, sexual harassment and reasonable accommodation. This video is a great training tool for management, plaintiffs and attorneys and it is also available for streaming at the Department’s website, <http://www.dfeh.ca.gov/equalrights101>.

The Department is in process of posting online lesson plans, FAQs, links and other background information. Meetings with the State’s School Superintendent and the Department of Education have been initiated to make this a part of the ninth grade “life skills” curriculum.

**Outreach:** The Department is hoping to revitalize the Northern and Central California Employment Round Tables to the same vigor as the Southern California chapter, which has been extremely active since the 1980’s.

Director Cheng and ELAS Noel have met with the Real Property Law Section’s Chair to establish a fair housing and reasonable accommodation subsection within the State Bar. Hopefully, this subsection will grow and become a conduit in giving feedback to the Commission on its housing regulations.

**50<sup>th</sup> Anniversary of the FEHA:** The Department is providing civil rights leadership for the 50<sup>th</sup> Anniversary of the Fair Employment and Housing Act (FEHA). The State Bar’s Labor and Employment Law Section is going to devote its entire year to the theme of the 50<sup>th</sup> Anniversary. This theme will be emphasized at the State Bar’s Annual Meeting, at the Public Sector Conference, in articles for the Law Review, and with the newly formed Fair Housing Group. There will be a law student writing competition, radio programs, brown bag lunches, articles and DFEH Director’s Case Law Alerts pertaining to the FEHA and its 50<sup>th</sup> Anniversary all year long.

Director Cheng speculated that it is going to be a great year to highlight and to advance the FEHA and the work of the DFEH and the FEHC.

**The next 50 years:** UCLA Law School and the RAND Corporation’s Social Justice Program will undertake a policy study of the FEHA with the data provided by DFEH over the past 12 years (225 cases). This study will show what the law has achieved and not achieved and where the law should be headed in the next 50 years. UCLA School of Law is currently seeking funding from the Hanes Foundation and the State Bar is interested in funding the study.

The Department is planning to issue its administrative regulations in 2010.

Director Cheng left the meeting at 3:45 p.m.

ELAS Noel continued with her report.

**ELAS ACTIVITY REPORT (Continued)**

**2008-09 & 2009-10 Budgets:** Up to this meeting California still does not have a state budget. The Commission has not asked for any budget change proposals for next year's budget.

**Adjudication and Settlement Conferences:** Since January 2008 to date, the Department has issued 46 accusations. The Commission's ALJs handled 18 proceedings from April 28, 2008 through September 5, 2008. These included 16 status or pre-hearing conferences and two evidentiary hearings, one of which settled after hearing. Due to a lack of state budget, many hearings are being postponed until later in the year.

**Ethics and Open Meeting Act Training:** ELAS Noel reminded the Commissioners that the state's online ethics training is required once every two years and the course is being offered on the state's Department of Justice's website, <http://ag.ca.gov/ethics>.

Staff has asked the Department of Consumer Affairs to speak on the Bagley-Keene Open Meeting Act at the next Commission meeting.

**Training, Outreach and Public Speaking:** Staff has curtailed most of its public speaking to concentrate on its regulatory work.

ELAS Noel spoke twice in May on disability discrimination, first with DFEH Chief Counsel Tim Muscat at a symposium at Commissioner Carol Freeman's law firm, Morgan Lewis, and second to a Los Angeles law firm, Mitchell Silberberg. On October 8, 2008, ELAS Noel and Chairman George Woolverton will speak to the County of Santa Cruz on disability discrimination.

ALJ Caroline Hunt reported that on September 25, 2008, Commission staff will present a training seminar for DFEH and defense counsel on "Litigating Before the Fair Employment and Housing Commission," co-sponsored by the Alameda County Bar Association. ALJ Hunt is organizing the seminar and all Commission ALJs and Commissioner Tamiza Hockenhull will participate as presenters.

ELAS Noel continued with her report.

**Staffing:** The Commission enjoyed and greatly benefited from the work until the end of the fiscal year on June 30 of two limited term employees: Margie Kelb and Bruce Carter, working respectively on disability regulations and housing regulations. Also working with the Commission this summer were three Hastings College of the Law students, Joshua Cruz, Katherine Joseph and Erin Kuka. This fall, another Hastings law student, Manisha Daryani, will work with the Commission part-time.

**ATTORNEY GENERAL'S REPORT**

Deputy Attorney General (DAG) Nancy Beninati reported on the work of the Civil

Rights Enforcement Section (CRES) of the Attorney General's (AG) Office. She discussed the following two cases.

The Office of the Attorney General has filed an amicus brief in *North Coast Women's Medical Group v. Benitez*. This case challenges an Unruh Act claim against the fertility clinic where several of their doctors refused to perform in vitro fertilization to a same-sex couple. The clinic made a defense claim that it was against several physicians' religion to provide fertility services to same-sex couples. California Supreme Court ruled that there was no such defense. This decision left open a lot of questions.

A familial status housing discrimination case, *DFEH v. Esquivel*, is currently on appeal in the Sixth District Court of Appeal. DFEH claimed that the landlord's rules were discriminating against tenants with children. The landlord then filed a Strategic Lawsuit Against Public Participation (SLAPP) suit claiming the Department is limiting their right to free speech. The Court of Appeal ruled that this was not the case. This was an unpublished opinion but the DFEH had asked the AG's Office to seek publication. The AG's Office filed the request on September 12.

### **PUBLIC COMMENTS**

Gail Blanchard-Saiger is interested in being kept informed about the Commission's regulations.

There were no other public comments.

Chairman Woolverton moved, Commissioner Ng seconded, and the Commission unanimously voted to adjourn the meeting. [08-27]

### **ADJOURNMENT**

The Commission adjourned its meeting at 10:20 a.m.

Date: September 16, 2008

GEORGE WOOLVERTON  
Chairman

ANN M. NOEL  
Executive and Legal Affairs Secretary



**REPORT OF TRANSACTIONS  
OF THE 474<sup>th</sup> COMMISSION MEETING  
September 16, 2008  
Held Telephonically in  
Los Angeles, Sacramento, Palo Alto, San Leandro  
and San Francisco, California**

THE COMMISSION AT THIS MEETING TOOK THE FOLLOWING ACTIONS:

- 08-23            Unanimously called the meeting to order.
- 08-24            Adopted the Minutes and Transactions of the 473<sup>rd</sup> Commission meeting.
- 08-25            Voted 4:0 to adopt the proposed decision in DFEH v. Maureen O'Neill Family Trust  
(Lemons/Williams)
- 08-26            Voted 4:0 to make the proposed decision in DFEH v. Maureen O'Neill Family Trust  
(Lemons/Williams) precedential.
- 08-27            Approved adjourning the meeting.

Prepared By

Loc D. Tra  
Clerk of the Commission